A **MALAYSIAN REFINING COMPANY SDN BHD**

v.

SUMATEC ENGINEERING AND CONSTRUCTION SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
SYED AHMAD HELMY JCA
ZAHARAH IBRAHIM JCA

C [CIVIL APPEAL NO: W-02(IM)(NCC)-3223-2010]
7 FEBRUARY 2011

D ***BANKING:*** *Performance bonds - Beneficiary's right - Call on bond - Unconditional on-demand bond - Whether bank obliged to pay once a valid demand is made by beneficiary - Whether unconscionable to call on performance bond - Whether ground for allowing restraining order - Whether unconscionable act proved on facts*

E ***CONTRACT:*** *Building contract - Performance bond - Whether unconscionable to call on performance bond - Whether ground for allowing restraining order*

F ***CONTRACT:*** *Guarantee - Bank guarantee - Unconditional on-demand performance bond - Whether bank obliged to pay once a valid demand is made by beneficiary - Whether unconscionable to call on performance bond - Whether ground for allowing restraining order - Whether unconscionable act proved on facts*

G ***CONTRACT:*** *Performance bond - Beneficiary's right - Call on bond - Unconditional on-demand bond - Whether bank obliged to pay once a valid demand is made by beneficiary - Whether unconscionable to call on performance bond - Whether ground for allowing restraining order - Whether unconscionable act proved on facts*

H The appellant awarded the respondent a design and construction contract. The contract sum as initially agreed by the parties was RM47,846.688. As required, the respondent provided a performance bond (in the form of a bank guarantee) for the due performance of the contract for a sum of RM4,784,668.80 which was equivalent to (10%) of the total value of the contract. In the course of the works, disputes arose between the parties. The respondent also claimed that the appellant had reduced the scope of the respondent's works by removing certain aspects of the

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works from the original scope of works. In effect the value of the remaining contractual works had by that move been reduced to about RM13 million. However, the bank guarantee still remained in force notwithstanding this reduction in the total value of works. The respondent claimed that they had duly completed all works and that the appellant had confirmed this by the issuance of a provisional acceptance certificate. However, at this point, the appellant made a claim for 'back charges' without any notice of defects given to the respondent to rectify any such defects. The respondent argued that this was in disregard of the terms of the contract. Despite several meetings, the parties could not resolve their differences. In the meantime the respondent was informed by BIMB that the appellant had made a demand for payment of the bank guarantee. Hence, the respondent applied for an injunction to restrain the appellant from calling upon the bank guarantee. The respondent obtained an exparte injunction to that effect. The appellant applied to set aside this *ex parte* injunction. The High Court allowed the respondent's application for an injunction and dismissed the appellant's application to set aside the *ex parte* injunction. Hence, this appeal. The respondent contended the appellant's call on the bank guarantee amounted to unconscionable conduct on its part.

Held (allowing the appeal with costs):

(1) The bank guarantee was couched as unconditional on-demand in nature. Therefore, once a valid written demand was made by the beneficiary (the appellant), the bank (BIMB) was obliged to pay the amount stipulated therein "without any proof and conditions". The bank was not concerned with the underlying contract between the parties. The bank's undertaking to pay under the bank guarantee was unconditional and irrevocable. The demand made by the appellant was good and valid for the purpose of the said bank guarantee. (para 22)

(2) To establish "unconscionability", there must be placed before the court manifest or strong evidence in respect of the alleged unconscionable conduct complained of, not a bare assertion. The respondent had to satisfy the threshold of a seriously arguable case that the only realistic inference was the existence of "unconscionability" which would basically mean establishing a strong *prima facie* case. This additional ground

of "unconscionability" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man. Whether or not "unconscionability" has been made out is largely dependent on the facts of each case. (para 24)

(3) The respondent had failed to adduce sufficient evidence of unconscionable conduct on part of the appellant in making a call on the bank guarantee in question. There was no concluded agreement between the parties to reduce the limit of the guarantee as alleged by the respondent. The terms of the bank guarantee stated clearly that the guarantee was binding notwithstanding any variations or alterations to the contract. The issuance of the provisional acceptance certificate did not help the respondent to establish "unconscionability" on part of the appellant. On the issue of "back charges", the respondent had acknowledged that the appellant may have a valid potential claim on the subject matter. There was thus nothing unconscionable about it. (paras 31 & 32)

(4) Negotiations between the parties were unduly prolonged and had reached stalemate. The calling of a bank guarantee under such circumstances, particularly when the expiry date of the bank guarantee was approaching and the negotiations had reached stalemate could not amount to unconscionable conduct on part of the beneficiary. (para 37)

(5) The balance of convenience tipped in favour of the appellant. Damages was sufficient remedy for the respondent if at the end of the day, it succeeded in its monetary claim against the appellant. There was no allegation that the appellant would not be able to satisfy the sum in dispute if the claim was subsequently resolved in favour of the respondent. (para 40)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah mengaward satu kontrak rekaan dan binaan kepada responden. Harga kontrak sepertimana awalnya dipersetujui oleh pihak-pihak adalah RM47,846.688. Seperti yang dipinta, responden telah menyediakan satu bon pelaksanaan berjumlah RM4,784,668.80 (dalam bentuk bank gerenti) bagi pelaksanaan kontrak, iaitu bersamaan 10% dari nilai penuh kontrak. Semasa kerja-kerja sedang berjalan, pertikaian berbangkit di antara pihak-

pihak. Responden mendakwa bahawa perayu telah mengurangkan skop kerja responden dengan cara mengeluarkan beberapa aspek tertentu dari skop kerja asal. Secara berkesannya, melalui pengurangan tersebut, nilai baki kerja di bawah kontrak telah berkurang sebanyak lebih kurang RM13 juta. Bank gerenti, bagaimanapun, masih berkuatkuasa walaupun nilai kerja telah berkurangan. Responden mendakwa bahawa mereka telah pun menyempurnakan semua kerja-kerja dan bahawa perayu telah mengesahkannya apabila telah mengeluarkan sijil penerimaan sementara baginya. Apapun, pada masa yang sama perayu telah membuat tuntutan 'back charges' walaupun tanpa memberi sebarang notis kecacatan kepada responden untuk membaik pulih. Responden berhujah bahawa tindakan perayu ini adalah bertentangan dengan terma-terma kontrak. Walaupun pihak-pihak telah beberapa kali bermesyuarat, namun mereka gagal menyelesaikan perbalahan mereka. Dalam pada itu, responden telah diberitahu oleh BIMB (bank) bahawa perayu telah membuat tuntutan terhadap bank gerenti. Berikutnya, responden memohon injunksi bagi menghalang perayu dari menunaikan bank gerenti, dan memperoleh satu injunksi *ex parte* untuk tujuan itu. Perayu memohon untuk mengenepikan injunksi, namun permohonan ditolak oleh Mahkamah Tinggi. Perayu merayu. Di rayuan, responden antara lain berhujah bahawa penunaian bank gerenti adalah satu perbuatan tidak berhati perut di pihak perayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Bank gerenti diungkapkan sebagai bersifat atas tuntutan dan tanpa syarat. Oleh itu, sebaik suatu tuntutan bertulis yang sah dibuat oleh benefisiari (perayu), bank (BIMB) bertanggungan untuk membayar jumlah yang tertera "tanpa sebarang bukti atau syarat". Bank tidak perlu risau tentang kontrak yang dimasuki oleh pihak-pihak. Akujanji bank untuk membayar di bawah bank gerenti adalah tidak bersyarat dan tak boleh dibatalkan. Tuntutan yang dibuat oleh perayu adalah teratur dan sah bagi maksud bank gerenti tersebut.

(2) Untuk membuktikan "unconscionability", harus ada di hadapan mahkamah keterangan yang kuat atau nyata berkaitan kelakuan tidak berhati perut yang dirunguti, bukan satu pengataan semata-mata. Responden harus memenuhi threshold kes yang

A boleh dihujah dengan serius bahawa satu-satu inferens yang realistik adalah kewujudan "unconscionability" yang sekaligus bermakna membuktikan suatu kes *prima facie* yang kukuh. Alasan tambahan bagi "unconscionability" seharusnya hanya dibenarkan secara berhati-hati iaitu di mana peristiwa atau
B tingkah laku adalah sebegitu rupa sehingga mencengkam hati budi seseorang yang munasabah dan berakal. Sama ada atau tidak "unconscionability" dibuktikan sebahagian besarnya bergantung kepada fakta sesuatu kes.

C **(3)** Responden gagal mengemukakan keterangan mencukupi tentang kelakuan perayu yang dikatakan tidak berhati perut apabila membuat tuntutan terhadap bank gerenti berkenaan. Tiada perjanjian telah dimeterai antara pihak-pihak bagi mengurangkan had gerenti seperti yang didakwa oleh
D responden. Terma-terma bank gerenti menyatakan dengan jelas bahawa gerenti adalah mengikat walaupun terdapat variasi atau perubahan pada kontrak. Pengeluaran sijil penerimaan sementara tidak membantu responden dalam membuktikan "unconscionability" di pihak perayu. Berhubung isu "back
E charges", responden telah mengakui bahawa perayu mungkin mempunyai tuntutan yang sah dalam perkara tersebut. Oleh itu, tiada apapun yang tidak berhati perut mengenainya.

(4) Rundingan antara pihak-pihak mengambil masa yang terlalu
F panjang dan telah menemui kebuntuan. Penunaian bank gerenti dalam halkeadaan sedemikian, terutama bilamana tarikh luputnya sudah semakin hampir dan rundingan menemui jalan buntu, tidak boleh menjadi satu kelakuan tidak berhati perut di pihak benefisiari.

G **(5)** Imbangan keselesaan lebih condong ke arah perayu. Gantirugi merupakan remedi mencukupi bagi responden jika pada akhirnya mereka berjaya dalam tuntutan kewangan mereka terhadap perayu. Tiada dakwaan bahawa perayu tidak mampu untuk memenuhi jumlah dipertikai jika tuntutan akhirnya
H diputuskan dengan memihak kepada responden.

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Case(s) referred to:

Bocotra Construction Pte Ltd v. AG [1995] 2 SLR (R) 262 ***(refd)***

Commercial Bank of Australia Ltd v. Amadio and Another [1983] 46 ALR 402 ***(refd)***

Dauphin Offshore Engineering and Trading Pte Ltd v. The Private Office of HRH Sheikh Sultan Khadifa Zayed Al-Nahyan [2000] 1 SLR (R) 117 ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***

Lloyds Bank v. Bundy [1975] QB 326 ***(refd)***

Min Thai Holdings Pte Ltd v. Sunlabel Pte Ltd & Anor [1999] 2 SLR 368 ***(refd)***

Shanghai Electric Group Co Ltd v. PT Merak Energi Indonesia [2010] 2 SLR 329 ***(refd)***

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, vol 17, p 682

For the appellant - Azlan Sulaiman (Mahir Juhari with him); M/s Azmi & Assocs

For the respondent - Alex de Silva (Melinda D'Angeles with him); M/s Bodipalar Ponnudurai De Silva

[Appeal from High Court, Kuala Lumpur; Suit No: D-22NCC-1123-2010]

[Editor's note: For the High Court judgment, please see Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2010] 1 LNS 1355.]

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellant (the defendant) against the order of the High Court dated 15 October 2010 where the respondent's application for an injunction to restrain the appellant from calling upon a bank guarantee issued by Bank Islam Malaysia Berhad (BIMB) was allowed and the appellant's application to set aside an *exparte* injunction dated 4 February 2010 was dismissed with costs.

[2] At the High Court, the respondent (the plaintiff) had made an application for injunction as follows:

a) to restrain the appellant from calling upon a bank guarantee issued by BIMB pending disposal of the High Court action or such further orders;

b) alternatively, if a demand had been made by the appellant, for the appellant to be restrained from receiving the sum guaranteed thereunder;

c) further alternatively, if any sum have been released by BIMB to the appellant, the appellant to be restrained from utilizing or dealing with such sums pending determination and disposal of the respondent's claim in the High Court suit or such further orders; and

d) if the monies under the bank guarantee had been paid to the appellant, the appellant was to be directed to refund such monies to the bank until disposal of the High Court action or such further orders.

[3] An *exparte* injunction was granted by the High Court on 4 June 2010 and the matter was fixed for hearing *inter parties*. The appellant then filed an application to set-aside the *exparte* order. On 15 October 2010, the learned High Court Judge allowed the respondent's application for injunction and dismissed the appellant's application to set aside the *exparte* order. The appellant then on 22 December 2010, filed the present appeal in the Court of Appeal.

Factual Background

[4] By a letter of award dated 9 May 2008, the appellant awarded to the respondent a contract for the design, supply, fabrication and erection of structural steel for the Melaka Refinery PSR-2 Revamp Project at Sungai Udang, Melaka. Further by another letter of award dated 15 May 2008, the appellant awarded to the respondent a contract for the civil works for the same project ("Civil Works Contract"). For that propose the parties subsequently entered into a contract in writing for the said project. For all intents and purposes the High Court suit is concerned with the design contract, which is a bill of quantities contract and not a lump sum contract.

[5] The effective date of the contract was 9 May 2008; and the scheduled completion date was 31 May 2009. The full contract sum as initially agreed by the parties was RM47,846.688.

[6] The respondent was required to provide a performance bond (in the form of a bank guarantee) for the due performance of the contract for a sum of RM4,784,668.80 which is equivalent to (10%) of the total value of the contract. The performance bond was to be valid from the date of the letter of award until (3) months after the end of the warranty period. The warranty period shall be (12) months from the date of the provisional acceptance certificate. Accordingly the respondent procured a bank guarantee from BIMB, no: TFP 02536080146 dated 13 October 2008 for the said sum with the appellant as the beneficiary. Pursuant thereto, the respondent mobilized and commenced works on site.

Disputes Between The Parties

[7] In the course of the works, disputes arose between the appellant and the respondent.

[8] The respondent claimed that their works were seriously hindered by delays on the part of the appellant to supply complete drawings and this had a knock-on effect on the production and fabrication of steel structures for the project. Further, it was alleged that there were no specific milestone set for completion of parts or stages of the works but that the completion date set for 31 May 2009 was for the overall works.

[9] The respondent also claimed that the appellant had reduced the scope of the respondent's works by removing certain aspects of the works from the original scope of works. This variation was formally confirmed on 16 June 2009. In effect the value of the remaining contractual works had by that move been reduced to about RM13 million. However, the bank guarantee as issued still remained in force notwithstanding this reduction in the total value of works.

[10] The respondent further asserted that they had by 31 May 2009 duly completed all works required of them under the reduced scope of contract by delivery of all agreed steel structure. The appellant had confirmed this by the issue of a provisional acceptance certificate on 17 November 2009 which certified that the respondent's contractual works had been carried out and completed by the respondent as of 31 May 2010.

[11] Upon completion of their works as aforesaid, the respondent had raised with the appellant two claims for unpaid monies for a total sum of about RM4 million. The appellant in turn had allegedly introduced a claim for 'back charges' without any notice of defects given to the respondent to rectify any such defects, and this according to the respondent was in disregard to the terms of the contract. The respondent claimed that this had been seriously disputed by the respondent and further highlighted the fact that the provisional acceptance certificate had been issued to the respondent in 17 November 2009 notwithstanding the claim for 'back charges'.

[12] The respondent produced records, in the form of minutes of meetings and correspondence to show that the parties had and continued to be engaged in active negotiation to resolve their disputes and finalize the final account as between them. Although the parties have had several meetings to resolve their respective claims against the other, parties have not managed to resolve their differences. In the meantime the respondent was informed on 1 June 2010 by BIMB that the appellant had made a demand for payment of the bank guarantee.

Appellant's Contentions

[13] The appellant (as the beneficiary of the bank guarantee in question) contended that the said bank guarantee, being unconditional and on-demand in nature cannot be restrained from being called and payment being made out of it by BIMB. To the appellant the only recognized exception to the bank's obligation to pay out on an on-demand unconditional guarantee is the case of fraud which has been brought to the notice of the bank; and the fraud must be clearly established. In the present case, the appellant claimed that no fraud by the appellant has been alleged by the respondent in their notice to the bank.

[14] The appellant also contended that the respondent's allegation that the call on the bank guarantee was made in bad faith and/or unconscionable conduct has no merit. To the appellant bad faith or unconscionable conduct is not an exception to the rule in the Malaysian courts; and therefore cannot be relied upon to injunct the payment out of the bank guarantee, once a valid written demand is made by the beneficiary.

[15] Thus, in the present case, the appellant argued that it had made a valid demand and the bank, therefore is obliged to make payment as demanded by the appellant. A

Respondent's Contentions

[16] The respondent on the other hand contended the appellant's call on the bank guarantee amounts to unconscionable conduct on its part and in itself is a sufficient ground to challenge the calling for payments under the said bank guarantee. To the respondent, "unconscionability" is a separate and distinct exception, in addition to fraud, upon which the court could grant restraining order even in the case of an on-demand unconditional guarantee and there were adequate circumstances surrounding this case to establish "unconscionability". B C

[17] The respondent raised the following grounds to establish "unconscionability" on part of the appellant in calling for the bank guarantee, namely *inter alia*: D

a) there was an agreed reduction in the scope of works from that originally contracted for between the respondent and the appellant; E

b) a provisional acceptance certificate had been issued to the respondent for works performed to completion by the respondent up to 31 May 2009. The certificate certified that the works completed up to 31 May 2009 by the respondent was accepted as satisfactory to the appellant; F

c) the appellant had no claims for any LAD for any delay and neither had the appellant raised any other complaints/disputes, if at all the respondent was at default; G

d) there was a one year gap between the date when the completed works was provisionally accepted and the date of the demand of the bank guarantee without any explanation by the appellant; H

e) the minutes of meetings show that the parties were still in discussions with each other to tie up loose ends and the respondent was still actively pursuing its unpaid claims for payment from the appellant; I

f) the appellant attempted to raise a claim for "back charges" despite not giving any notice to the respondent for defective works and not giving the respondent rectification opportunity;

g) there were ongoing negotiations between the parties to resolve the disputes. Notwithstanding the same, the appellant made a call on the bank guarantee; and

h) there is *prima facie* evidence of a reduction of the scope of works under the contract to a region of about RM13 million only. Accordingly, the demand on the bank guarantee for RM4,535,255.67 was equivalent to (40%) of the value of the reduced works. The amount was wholly disproportionate bearing in mind that the bank guarantee specifically set the limit of the guaranteed sum at (10%) of the contract value in all cases.

Findings Of The Learned High Court Judge

[18] The learned High Court Judge found that the demand made by the appellant on the bank guarantee was defective for not following strictly the terms of the bank guarantee itself, especially with regard to the guaranteed amount to be claimed.

[19] The learned judge also found that the said bank guarantee was an on-demand unconditional in nature. The words "shall pay to MRC on first notice without proof and condition" indisputably to the learned judge had the effect as that of an on-demand unconditional in nature.

[20] It is also the learned judge's finding that even conceding that the demand by the appellant was valid, the court still could intervene and prevent the demand being given effect to and the appellant be restrained from receiving with the monies under the bank guarantee, as there was sufficient basis to support the respondent's contention that the conduct of the appellant in making the demand was unconscionable, in the particular circumstances of the case. The High Court accepted that "unconscionability" can be a ground for court's intervention to restrain the making of payment under the bank guarantee and there are sufficient evidence to establish unconscionable conduct on part of the appellant in calling for the bank guarantee.

Findings Of This Court

[21] Clause 1 of the bank guarantee provides:

> If the CONTRACTOR shall in any respect fail to execute the CONTRACT or commit any breach of its obligations thereunder as certified by MRC, the GUARANTOR shall pay to MRC on first notice and without any proof and conditions the sum of Ringgit Malaysia: Four Million Seven Hundred Eighty Four Thousand Six Hundred Sixty Eight and Cent Eighty Only (RM4,784,668.80) being 10% (ten percent) of the CONTRACT PRICE.

[22] On the face of it, and on the wordings disclosed above, the court is satisfied that the said bank guarantee appears to be couched as unconditional on-demand in nature. Therefore, once a valid written demand is made by the beneficiary (the appellant), the bank (BIMB) is obliged to pay the amount stipulated therein "without any proof and conditions". The bank is not concerned with the underlying contract between the parties. The bank's undertaking to pay under the said bank guarantee is unconditional and irrevocable. (see: *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 and *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473).

[23] In the present case, the demand made by the appellant was good and valid for the purpose of the said bank guarantee. In effect the said demand has substantially complied with terms of the bank guarantee eventhough it does not specify the amount demanded. The amount as specified in the bank guarantee is sufficient to identify the claim made.

[24] On the issue of "unconscionability" as raised by the respondent, even assuming the principle is to be applied and adopted in the present case, it must clearly be established and proven by evidence in the circumstances of the case. As in the case of fraud, to establish "unconscionability" there must be placed before the court manifest or strong evidence of source degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of "unconscionability" which would basically mean establishing a strong *prima facie* case. In

other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of "unconscionability" being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of "unconscionability" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[25] The principle concerning "unconscionability" was initially propounded by Lord Denning in the case of *Lloyds Bank v. Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This "unconscionable" category is said to extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker (see also: *Halsbury's Law of England*, 3rd ed. Vol. 17 [1956] at p. 682).

[26] On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. (see: *Commercial Bank of Australia Ltd v. Amadio and Another* [1983] 46 ALR 402).

[27] In the Singapore High Court, Lai Kew Chai J in the case of *Min Thai Holdings Pte. Ltd. v. Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368 opined that "the concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party."

[28] It is not possible to define "unconscionability" other than to give some very broad indications such as lack of *bone fides*. What kind of situation would constitute "unconscionability" would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no pre-determined categorization (see: *Dauphin Offshore Engineering and Trading Pte. Ltd. v. The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electric Group Co. Ltd. v. PT Merak Energi Indonesia* [2010] 2 SLR 329).

[29] Based on the above considerations, we are of the view that there is no simple formula that would enable the court to ascertain whether a party had acted unconscionably in making a call on an on-demand performance bond or bank guarantee. In the final analysis, whether or not "unconscionability" has been made out is largely dependent on the facts of each case. In every case where "unconscionability" is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith.

[30] In *Bocotra Construction Pte. Ltd. v. A.G.* [1995] 2 SLR (R) 262, the Singapore Court of Appeal, stated that "a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient."

[31] In the present case, this court is satisfied the respondent has failed to adduce sufficient evidence of unconscionable conduct on part of the appellant in making a call on the bank guarantee in question. The issues of "unconscionability" as raised by the respondent in this case are clearly insufficient to establish its claim against the appellant.

[32] There was no concluded agreement between the parties to reduce the limit of the guarantee as alleged by the respondent. The terms of the bank guarantee state clearly that the guarantee is binding notwithstanding any variations or alterations given, conceded or agreed under the contract. (see: art. 10.1 of the Conditions of Contract); or by any alteration in the obligations undertaken by the contractor (see: cl. 2 of the bank guarantee).

[33] On the issue of removal of certain portions of the works as raised by the respondent, under cl. 31.1(f) and 31.4 of the Conditions of Contract, this does not affect or alter the respondent's obligations under the contract.

[34] The issuance of the provisional acceptance certificate (as raised by the respondent) also does not help the respondent to establish "unconscionability" on part of the appellant. As the name suggests, it only certified the completion of the works actually done or carried out by the respondent. Clauses 26.3.4 of the Conditions of Contract expressly preserve the respondent's obligations even with the issuance of the certificate.

[35] On the issue of "back charges" as raised by the respondent, the court finds that "back charges" were incurred for costs of rectification works to steel supplied by the respondent and the respondent acknowledged that the appellant may have a valid potential claim on the subject matter. These are ordinary common charges in the industry. There is nothing unconscionable about it.

[36] There is also nothing unconscionable with regard to the respondent's claims under "unpaid invoices". These claims were taken into account by the appellant in arriving at the amounts due and owing to the respondent under the contract. Documents at pp. 655-659 of the records of appeal support this finding.

[37] The respondent also argued that it was unconscionable on part of the appellant to make the call on the bank guarantee when negotiations were ongoing when the demand was issued. The evidence shows otherwise – Negotiations had been unduly prolonged and had reached stalemate. The calling of a bank guarantee under such circumstances, particularly when the expiry date of the bank guarantee is approaching and the negotiations had reached stalemate, cannot amount to unconscionable conduct on part of the beneficiary (the appellant).

[38] The respondent also argued that 'unconscionability' arose when the demanded sum is more than (10%) of the reduced contract price of RM13 million (originally the total contract price was RM47 million). This court cannot agree with the respondent on this point. The said bank guarantee was issued for the sum of RM4,784,668.80 being (10%) of the initial total contract price. It is an irrevocable undertaking by the bank to pay such an amount on demand made by the beneficiary. The liability to pay as well as the amount to be paid is irrevocable. The bank is only concerned with the terms of the bank guarantee, but not the underlying contract. If the contract price under the underlying contract is varied or reduced, it has no effect on the undertaking of the bank under the bank guaranteed, unless perhaps the guaranteed sum is reduced after being agreed by all parties concerned including the bank. This is not the case here. So long as the bank guarantee is still valid (not yet expired) the appellant is entitled to demand the amount stipulated in the bank guarantee.

[39] The issue of fraud is not pleaded in the present case. Therefore the court finds it unnecessary to touch on the issue in this present case.

[40] The balance of convenience in the case tipped in favour of the appellant. Damages is sufficient remedy for the respondent if at the end of the day, it succeeds in its monetary claim against the appellant. There is no allegation that the appellant will not be able to satisfy the sum in dispute if the claim is subsequently resolved in favour of the respondent.

Conclusion

[41] Based on the above considerations, this court unanimously allows this appeal with costs of RM10,000 to the appellant. Deposit to be refunded.